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DESEGREGATING LEGAL EDUCATION

Peggy Cooper Davis*

on the occasion of the
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Georgia State University College of Law

*Langdell: "Mr. Fox, will you state the facts in the
case of Payne v. Cave?"*

...

"Mr. Rawle, will you give the plaintiff's argument?"

...

*"Mr. Adams do you agree with that?"*¹

The Carnegie Foundation's thoughtful critique of legal education has made law faculties across the country more conscious of the responsibility we hold as we initiate people into a profession that is central to how we function as a society and how we relate to one another. Carnegie has a long tradition of holding professions accountable for how they define themselves and educate their members.² It is no surprise, then, that its 2007 report on legal education triggered fresh and frank assessment of what we teach law students, how we teach it and how we measure student learning.

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1. HARVARD LAW SCHOOL ASS'N, CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817–1917, at 34 (1918) [hereinafter HARVARD CENTENNIAL].

2. The Carnegie Foundation for the Advancement of teaching was founded in 1905 by Andrew Carnegie. In 1910, it produced the landmark "Flexner Report" on medical education. Subsequently, it developed the Graduate Record Examination, founded the Educational Testing Service, and created the Teachers Insurance Annuity Association of America (TIAA-CREF). Its report on legal education is part of its ongoing study of professional education. See <http://www.carnegiefoundation.org/about-us/about-carnegie>.

I focus here on just one aspect of the Carnegie Report—its recommendation that we “integrate” what the Report’s authors call the three professional apprenticeships—the cognitive, the ethical and the practical.³ Carnegie described the cognitive apprenticeship as the indoctrination to legal reasoning that comes mainly in the form of Langdellian or Socratic exchanges in large classrooms, and it gave the legal academy pretty high marks for managing the cognitive apprenticeship. But the Report faulted us rather mercilessly for our management of the ethical apprenticeship, which it described as the definition and normative critique of professional roles and responsibilities, and the practical apprenticeship, which it described as the “skills training” that one receives in simulation courses, clinics and internships: guidance and practice in legal research, fact development, interviewing, counseling, prescriptive drafting and oral and written advocacy.⁴ After documenting our neglect of both the ethical and the practical dimensions of professional practice, the Report called on us to reform legal education so that it would give balanced and integrated attention to the cognitive, the ethical and the practical.⁵

I accept wholeheartedly the Carnegie criticism that legal education wrongfully neglects the ethical and the practical and move on to consider what “integration” should mean and how it should be achieved. I argue that we cannot respond adequately to the Carnegie critique by simply taking care that we have on each law school campus a proper mix of Socratic and seminar courses, clinical and simulation courses and courses in professional responsibility. *We must take care not to segregate that which we have neglected, for segregation perpetuates misunderstanding and facilitates further neglect.*

We segregate the cognitive from the practical and the ethical in legal education for a variety of good and bad reasons, not all of which

3. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (Carnegie Report).

4. *Id.* at 12–14.

5. *Id.* at 191–92.

I am able to address in this essay. I have made elsewhere a feminist argument that cultural and psychological biases incline us to ghettoize practical and ethical work and to privilege what we think of as cognitive work.⁶ I stand by that claim, but make a distinct argument here: We have segregated “cognitive” development from “practical” and “ethical” development in part because we have misunderstood and derailed what I will call the Langdellian revolution in legal pedagogy.

Why would I speak of Langdellian pedagogy as “revolutionary”? As my colleague Carrie Menkel Meadow recently pointed out, Langdell’s approach to legal education has long been challenged for its conceptualism and formalism.⁷ In what follows, I question the now generally accepted view of Langdellian method as rigid, formalistic and antiquated. I urge that we see it as a step toward a more experiential pedagogy of the kind advocated by Dewey and other advocates of “progressive” education. I then describe the derailment of Langdell’s pedagogical revolution. I end by suggesting how we might get legal education back on track.

I introduce my argument with a personal reminiscence.

When I was a first year law student in 1965, I sat—mostly in the amphitheater-styled classrooms of Langdell Hall—for “Langdellian” or “Socratic” classes in Contracts, Torts, Criminal Law, Property, Constitutional Law and Civil Procedure. I thought this was the “real stuff” of law school. Most of my law professors were dazzling practitioners of Socratic method. I was almost as thrilled by their erudition and agile wit as I was terrified that they would glance up from their seating charts and call out my name. I still keep their pictures on my refrigerator.

That same year, I had “skills training” in Legal Research and Writing. I remember Legal Research and Writing as a necessary

6. Peggy Cooper Davis, *Slay the Three-Headed Demon*, 43 HARV. C.R.-C.L.L. REV. 619, 623–24 (2008) (arguing that relational aspects of practical and ethical work lead us to associate the work with femininity and subordination and therefore to disparage it).

7. Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and after “The Law,”* 60 VAND. L. REV. 555, 561–64; see also Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 631–35 (arguing that Langdell viewed law as a fixed system, like a pre-Kuhnian natural science).

nuisance taught by bored third (or maybe second) year students. This program ended with a mandatory Moot Court competition. I remember Moot Court as a marginalized but mysteriously satisfying experience that convinced me of the necessity of developing research and writing skills but seemed oddly incomplete.

I went to law school before Watergate and the obligatory course in professional responsibility,⁸ so attention to ethical issues was a hit or miss thing. I do recall that the Dean sometimes cautioned during 1L orientation that we should “never, never commingle our funds and our clients’ funds,” but I don’t recall much more in the way of an ethical apprenticeship.⁹

Entering the world of practice, I felt spottily prepared. I enjoyed analyzing and synthesizing cases, and I thought I did it pretty well, but I did it in a strangely isolated way. I imagined that my interpretations of case law were objective and insightful. I had never really thought about being an advocate or giving counsel. About the difficulty of interpreting law in a way that was both responsible and true to my client’s interests: I thought I wrote pretty clearly, but I hadn’t thought about what it takes to write persuasively. I gave little conscious thought to the effect my professional communications would have on others. I had never thought about how to resolve a dispute without litigation. Over ten years of practice I was awakened to the interactive and creative dimensions of lawyering, but law school had nothing to do with it.

I then became a lower court judge. It was fascinating to see things from the other side of the bench, but law school and practice had only partially prepared me for the complicated process of interpreting rules under always new and often pressing circumstances.

After three years on the bench, I joined the NYU Law School faculty. There, under the tutelage of mentors at least as dazzling as

8. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS 302(a)(5) (2009–2010) (requiring “substantial” instruction in professional responsibility); Deborah Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 (1992) (reporting history of the ABA professional responsibility requirement).

9. I also took a lecture course in The Development of Legal Institutions (not-so-fondly known as DLI). I dimly remember DLI as a quick and dirty, although sometimes useful, study of English legal history.

my 1965 Socratic interlocutors, I have repeatedly revisited the disparate parts of the traditional legal education I received all those years ago. In the process, I have come to understand why I was so confused in law school and why I was so spottily prepared to lawyer or to judge. In the process I also stumbled on the fascinatingly related history of Langdell's derailed initiative in legal education.

I. THE LANGDELLIAN REVOLUTION

Thanks in large part to the work of Anthony Chase¹⁰ and Bruce Kimball,¹¹ we now know that what we call Socratic or Langdellian teaching was not so much a retreat to formalism as it was an escape from learning by passive absorption of conclusions about the law to a regime of learning by original study and critique of judicial decisions.¹²

Chase's work points to the connection between Langdell's reformation of the law school curriculum and Charles Eliot's study of European learning theory. Eliot was president of Harvard University from 1869 to 1909, and in 1870, he appointed his friend, Christopher Columbus Langdell, as dean of the Harvard Law School. Legal education had recently migrated from law offices with apprenticeship arrangements to university campuses. Indeed, before he attended Harvard Law School, Langdell had completed an internship at a New York law firm that would have qualified him in most states for admission to the bar.¹³ At Harvard, and presumably at other university-based law schools, legal education was initially a rather informal affair, with no required courses, no examinations and no pedagogy beyond the recommendation of treatises and the

10. Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979).

11. See BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906* (2009).

12. *Id.* at 145 (quoting one of the first students of Langdell's case method as reporting, "The result of the method of Langdell was active search and inquiry; that of the other professors was passive absorption").

13. *Id.* at 31.

presentation of lectures in which bodies of law were summarized, often by treatise authors who simply read their treatises.¹⁴

Eliot, who was heavily influenced by Johann Heinrich Pestalozzi's pioneering work in education, must have found the law school curriculum entirely unsatisfactory. The Pestalozzi Method was a precursor of the "progressive" school of education championed in the United States by Francis Parker and John Dewey (indeed, after his tenure at Harvard, Eliot worked with Dewey at Columbia University). The method was grounded in the belief that the "aim of . . . teaching was to develop the children's own powers and faculties rather than to impart facts; to show not so much what [but] how to learn."¹⁵ An early opponent of corporal punishment, Pestalozzi argued that it was wrong either to strike children or to force-feed them information.¹⁶ Children should be lovingly supervised as they followed their own curiosity through carefully selected activities.¹⁷ They should learn things by experiencing them.¹⁸ They would then find or be given language for the things they had learned and solidify their knowledge as they repeated the process in increasingly challenging activities.¹⁹

Eliot was also influenced by the work of Friedrich Froebel, Edward Seguin, and Maria Montessori. Froebel, who studied with Pestalozzi, coined the term "kindergarten," to express his view that the child's inherent curiosity and drive to activity should be cultivated as one would cultivate a garden.²⁰ He credited Pestalozzi for developing learning methods that respected the dignity of each

14. *Id.* at 34 (explaining that until the late 1860s, teaching at Harvard Law School was considered "perfunctory" because it employed "'the old methods' of lecture and recitation").

15. Chase, *supra* note 10, at 343.

16. Letter from Johann Heinrich Pestalozzi to J.P. Greaves (Apr. 10, 1819), available at [http://www.heinrich-pestalozzi.de/en/documentation/time_life_and_work/level2/level_3/letters_on_early_education_overview/letter_XXX_april_10_1819/index.htm?no_cache=1&sword_list\[0\]=corporal&sword_list\[1\]=punishment](http://www.heinrich-pestalozzi.de/en/documentation/time_life_and_work/level2/level_3/letters_on_early_education_overview/letter_XXX_april_10_1819/index.htm?no_cache=1&sword_list[0]=corporal&sword_list[1]=punishment).

17. See JOHANN HEINRICH PESTALOZZI, HOW GERTRUDE TEACHES HER CHILDREN 165 (Lucy E. Holland & Frances C. Turner trans., Ebenezer Cooke ed., C.W. Bardeen 1898) (1801).

18. *Id.* at 165–66.

19. For an extensive review of Pestalozzi's Method, see Pestalozzi's World, Educating Children for a Better Life, <http://pestalozziworld.com/pestalozzi/methods.html>.

20. FRIEDRICH FROEBEL, FROEBEL'S CHIEF WRITINGS ON EDUCATION 237 (Samuel Sigmund Fehhheimer Fletcher & James Welton trans., J.W. Adamson ed., 1912).

individual child.²¹ Froebel designed games or “gifts” with which a child could gain knowledge and skill in acts of play.²² Writing of these games, he said that they “not only nourish the inner activity drive, but they also teach the use of the child’s immediate environment as a means for play and occupation and as educational aids.”²³ He added that the games were educational as well for the adults who supervised children’s play and that they were contexts for healthy and mutually instructive bonding.²⁴ Seguin worked principally with developmentally disabled children.²⁵ He believed that physiological impairment complicated and slowed a developmentally disabled child’s process of learning as the child was led by curiosity to experience and name things.²⁶ The solution was to have an adult lead the child through activities, directing and assisting to a greater extent than would be necessary with other children.²⁷ In the beginning of her career, Maria Montessori also worked with developmentally disabled children, but she extended her insights and those of Froebel and Seguin to develop learning tools for all students.²⁸ Expanding on the work of Froebel and Seguin, she created environments in which children of different ages could learn collaboratively as they shared and discussed experiences.²⁹

Eliot consistently sought to implement these experiential methods at Harvard.³⁰ Before he became president of the university, he revolutionized the Harvard chemistry department by having students conduct laboratory experiments rather than listen to lectures.³¹ We

21. *Id.* at 19.

22. *Id.* at 21–22.

23. JOACHIM LIEBSCHNER, A CHILD’S WORK: FREEDOM AND PLAY IN FROEBEL’S EDUCATIONAL THEORY AND PRACTICE 82 (The Lutterworth Press 1992) (2001).

24. FROEBEL, *supra* note 20, at 101.

25. JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 40 (1994).

26. *Id.* at 48.

27. Edouard Seguin, *Origin of the Treatment and Training of Idiots*, in *IDIOTS AND THE EFFORTS FOR THEIR IMPROVEMENT* 24–25 (L.P. Brockett ed., Hartford, Case, Tiffany & Co. 1856).

28. *See generally* MARIA MONTESSORI, THE MONTESSORI METHOD (Anne E. George trans., 1912).

29. Association Montessori Internationale (AMI), Montessori Approach, <http://www.montessori-ami.org/> (last visited Dec. 5, 2009).

30. Chase, *supra* note 10, at 343.

31. *Id.* at 334.

can imagine the laboratory experiment as a Froebilian “gift” that puts the chemistry student in an educational state of play. He then designed and taught laboratory sciences at M.I.T. In 1896, Eliot published a description of his teaching methods in a two-part article, *The New Education: Its Organization*. There, Eliot rejected the lecture method and learning by rote memorization in favor of collaborative student-teacher interactions in which students learned by reasoning inductively. He also advocated more rigorous admissions policies and degree requirements for graduate study.³²

Although Langdell is not known to have had independent knowledge of education theory, his views about pedagogy resonated with those of Eliot, his president and long time friend.³³ As Eliot had recommended for all graduate and professional schools, Langdell tightened admissions criteria at the law school.³⁴ He also introduced examinations and a required set of courses. But Langdell’s best remembered innovation was legal study by the ‘case method.’ Harvard law students would no longer spend their time reading treatises or sitting passively as treatises were summarized or read to them. As Eliot was insisting that people learn better as active problem-solvers than as passive receptacles of information, Langdell set about to make active problem-solvers of law students. He gathered and distributed to his students sets of judicial opinions that had been issued in related cases, assigning a sub-set to be read in preparation for each class. And he transformed his classes from a lecture format to the format that came to be known as Socratic method. No longer did students sit and listen while a lecturer droned on; they became active players in the classroom drama. The Centennial History of the Harvard Law School describes in this way the first few minutes of the first meeting of Langdell's new kind of class:

32. *Id.* at 334–36.

33. For an account of the Langdell-Eliot relationship, begun when they were both Harvard undergraduates, see KIMBALL, *supra* note 11, at 37–39.

34. Chase, *supra* note 10, at 332.

Langdell: “Mr. Fox, will you state the facts in the case of *Payne v. Cave*?”

Mr. Fox did his best with the facts of the case.

Langdell: “Mr. Rawle, will you give the plaintiff’s argument?”

Mr. Rawle gave what he could of the plaintiff’s argument.

Langdell: “Mr. Adams do you agree with that?”

In his well documented biography of Langdell, Bruce Kimball has given us more extended recreations of the discourse in Langdell’s classes by piecing together notes from Langdell’s papers, annotations by Langdell and by his students in the margins of casebooks, and other sources.³⁵ All of these reconstructed texts reveal a climate of active learning.

Rather than take the judicial opinion as received wisdom, Langdell’s students were asked to replicate, or improve on, the judge’s reasoning and the arguments of the lawyers on each side who framed and guided the judge’s thinking. Students were asked to imagine and understand the context in which judicial decision-making occurs and to recreate the dynamic within which a decision is reached. Within the constraints of precedent and *stare decisis*, what arguments might have been made responsibly on each side? How might they have been received? How might they have been answered? These were questions to be pondered and debated rather than pronouncements to be received. They replicated problems and tasks of practice. They required students to perform rather than simply to absorb. They made the classroom a dialogic experience in which experts and novices developed knowledge as they worked discursively to solve problems. As Kimball also shows, Langdell’s examinations took a similar form: he gave students the Froebelian gifts of hypotheticals to puzzle over in light of what they understood to be established law.³⁶

In all these respects, the Langdellian system embodied the educational theories that were pioneered by Pestalozzi, developed in

35. KIMBALL, *supra* note 11, at 147–48.

36. *Id.* at 160–64.

elementary and remedial education by Froebel, Seguin and Montessori,³⁷ and embraced by Eliot in the university context. Eliot approvingly described Langdell's innovations in a 1920 essay in the Harvard Law Review:

Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Seguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives. He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions directly in the classroom. He led them to exact reasoning and exposition by first setting an example himself, and then giving them abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and secondly, that they might hold firmly the information or knowledge they had acquired. It was a strong case of education by **drawing out from each individual student mental activity of a very strenuous and informing kind**. The elementary and secondary schools of the United States are only just beginning to adopt on a large scale this method of education, a method which is not passive but intensely active, not mainly an absorption from either book or teacher but primarily a constant giving-forth.³⁸

The initial response to Langdell's method was anxious and critical. Students were uncomfortable with expressing their necessarily novice opinions in a public setting.³⁹ They complained that they weren't learning as they had in lectures. They even suggested that Langdell gave up lecturing because he didn't know anything and hence had

37. DENIS LAWTON & PETER GORDON, A HISTORY OF WESTERN EDUCATIONAL IDEAS 204–07 (2002); Museum of disABILITY History, Biography of Edward Seguin (1812–1880), http://www.museumofdisability.org/education_educators.asp.

38. Charles Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518 (1920) (emphasis supplied).

39. KIMBALL, *supra* note 11, at 144–45.

nothing to say. Soon only seven or eight students were attending his class.⁴⁰

Langdell was able to remake legal education only because he persisted despite three consecutive years of declining enrollments. He was convinced that memorization of material gleaned from lectures and treatises is less valuable to law students than learning to analyze and reason from law's primary sources. And in time enrollment picked up. Graduates of Langdell's program proved themselves well-prepared for practice and were able to get good jobs.⁴¹ Within little more than forty years, Langdell's case method was vindicated. When in 1914, the Carnegie Foundation commissioned its first report on legal education in the United States, the author, Josef Redlich, pronounced the Socratic method a success.⁴² Law schools were settled, for what will surely be at least a century, into a dialogic method for training novice practitioners.

On this account, we can understand the Socratic method as the first of several moves toward giving law students the chance to learn in the way psychologists increasingly say that both children and adults learn best: by working collaboratively and at the growing edge of their abilities—at times sharing and applying collaborators' knowledge and methods, at other times gaining new knowledge and developing new methods.⁴³ A student came to the Langdellian classroom with knowledge of a set of cases and preliminary interpretations of those cases. In the classroom, the student was engaged in dialogue to test competing interpretations and perhaps come to new interpretations.

The next step from this kind of experiential, student-centered and collaborative learning might reasonably have been progression to simulation and clinical courses in which students could be still more

40. *Id.*; see also HARVARD CENTENNIAL, *supra* note 1, at 35.

41. See KIMBALL, *supra* note 11, at 140–46; Chase, *supra* note 10, at 338–39.

42. JOSEF REDLICH, COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1914).

43. For fuller explanations of this kind of experiential, collaborative learning, see ROLAND G. THARP & RONALD GALLIMORE, ROUSING MINDS TO LIFE: TEACHING, LEARNING AND SCHOOLING IN SOCIAL CONTEXT 31 (1988); 1 THE COLLECTED WORKS OF L.S. VYGOTSKY 212 (Robert W. Reiber & Aaron S. Carton eds., 1987); L.S. VYGOTSKY, MIND AND SOCIETY 86 (1978).

active and independent. As we will see, however, the relationship between Langdellian teaching and simulation or clinical teaching came to be understood much differently.

II. THE DERAILEMENT

Despite widespread acceptance of the Langdellian method, student anxiety did not entirely abate. Students wondered—and wonder to this day—what exactly they are meant to learn in a Langdellian classroom. Does the dialogic dance lead invariably to identification of a right answer? If so, why doesn't someone figure out the right answers and write them down? If not, what are law students supposed to learn? The appetite for answers and for certainty distracts students from the process of developing judgment as they turn to hornbooks and return to rote learning. The first Carnegie Report echoed this sentiment. Redlich tempered his praise of Langdellian method with an insistence on the importance of supplementing Socratic discourse with introductory lectures; a forum for having questions answered; and textbooks, dictionaries and encyclopedias. Socratic back and forth was fine, but at the end of the day there had to be a place to go to for “right answers.”

Ironically, the complaint that Langdellian method provides no “right answers” was soon to be turned on its head: Along came the Legal Realists with the news that legal questions often do not have single and verifiable “right answers.” Legal Realists observed that lawyers and judges are regularly faced with situations for which there is no precedent and to which the texts of statutes and prior judicial decisions do not speak definitively. The corollary was that scholars, lawyers and judges should stop searching for fixed answers to legal questions and begin to find principled ways of working with an inevitable indeterminacy. Thinking about law, lawyering and judging should extend beyond the four corners of authoritative legal texts (principally judicial opinions and legislative or administrative enactments) to examine how the answers to legal questions are constructed, interpreted and argued. Realists might have adopted a friendly attitude toward Langdellian discourse, seeing it as going

beyond judicial opinions to wrestle with the underlying arguments from which those opinions emerged. Unfortunately, two things conspired against a harmonious relationship between Langdellians and Realists: Langdell's belief in an "academic elite" and his suggestion that law is analogous to "science."

Langdell did believe, in a certain sense, that law students should be taught by an "academic elite." As Langdell himself put it, "a candidate for professorship in the law school . . . is required as a *sine qua non* to distinguish himself in the Law School . . . [by] being one of the very first men in his class."⁴⁴ Despite his own fifteen years of practice experience, Langdell saw academic distinction not only as a necessary requirement for the professoriate of a law school, but as a sufficient one: "What qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in *using* the law, but experience in *learning* the law."⁴⁵ Kimball documents Langdell's disgust with what he saw as corruption among practitioners⁴⁶ and concludes that "Langdell proceeded to the extreme heresy that accomplishment in legal practice . . . may in fact be *detrimental*. He believed that purity of academic merit was required of those who profess the law."⁴⁷ It is no surprise, then, that practice-grounded Legal Realists did not embrace Langdell's method or see it as a path to understanding the constructedness of law.

Langdell's disdain for the world of practice combined with his (and Eliot's) embrace of a laboratory or "scientific" approach to learning to suggest absolutism. In the Realists' view, Langdellian method was not just blind to the complexities of practice; its star-gazing bookishness fostered the illusion that legal problems could be solved by cloistered study rather than worked out in the trenches of

44. KIMBALL, *supra* note 11, at 169 (quoting a letter from Langdell to Elliot, dated November 22, 1897).

45. *Id.* (quoting Christopher C. Langell, Address, in REPORT OF THE NINTH ANNUAL MEETING AT CAMBRIDGE, JUNE 25, 1985 41, 48 (Harvard Law School Association, 1895)) (emphasis supplied).

46. *Id.* at 69–77.

47. *Id.* at 169.

practice and judging. This illusion of determinacy unsettled an earlier and more nuanced jurisprudential model.

Prominent Realists found a model for principled work in an uncertain legal world in what Roscoe Pound described as the early or grand period in American law and in what Karl Llewellyn described as the grand or classic period.⁴⁸ These scholars argued that before the late nineteenth century, judicial decision-making was disciplined by the authoritative texts of precedent and enacted rules, but at the same time overtly a matter of exercising judgment rather than a matter of divining a preordained “right” answer. The claim was that there had been a shift in legal thought in the United States. In the formative, early years of American common law, judges appreciated, and litigators played to, the need to combine respect for precedent with what Llewellyn called “situation-sense,” an expert’s educated feel for how to apply and shape the law so that it is true to its perceived functions and to a shared sense of justice.⁴⁹ But in later years, the emphasis in teaching law “tended ever more strongly away from how . . . successive courts had used the slowly changing or expanding body of precedent; it shifted rather to the unfolding and uncovering of some ‘true’ principle assumed to have been in the law all along.”⁵⁰

What the Realists perceived as a shift to the uncovering of “true” principles was coincident with the rise of the Langdellian casebook and teaching method. More sober Realists declined to assume as a result that Langdellianism had caused the law’s newfound commitment to absolutism or “true” principles.⁵¹ Other Realists, no doubt influenced by Langdell’s well known disdain for practitioners, assumed that Langdellianism was equivalent to rigid formalism. This is rather crudely revealed in an influential article by Realist Jerome Frank. Unlike most Realists, Frank had occasion to set out in detail his views about the law school curriculum. In or shortly before 1932 he was asked by the Alumni Advisory Board of the University of

48. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 35–36 (1960).

49. *Id.* at 212–57.

50. *Id.* at 120.

51. *Id.* (describing as ironic the fact that the case book method did not highlight indeterminacy); *id.* at 360 (criticizing Jerome Frank for making inaccurate charges against Langdell).

Chicago's law school to draft a proposal for curricular change. Frank's report was not only submitted to the Alumni Advisory Board, but also published as a law review article and widely discussed, if not widely heeded, throughout legal academia.⁵²

The report began with a factually inaccurate and oddly personal assault on Langdell and his Socratic methods. Although Langdell was an experienced and successful practitioner, Frank described him as an almost pathologically reclusive man who was largely ignorant about the practice of law and similarly ignorant about, and inept at, human interaction. According to Frank, "the so-called case system . . . was the expression of the strange character of a cloistered, retiring bookish man," and it was "[d]ue to Langell's idiosyncracies" that law school came to be focused almost exclusively on books.

Llewellyn had suggested that the case method's examination of a line of cases was well-suited to demonstrating indeterminacy, for it exposed "how . . . successive courts had used [a] . . . slowly changing or expanding body of precedent." Frank disagreed. He argued that students who learned about law and lawyering from appellate opinions were "like future horticulturists confining their studies to cut flowers,"⁵³ blind to the roots and the developmental life of the legal matters they needed to understand. The Langdellian method was not a case method at all, Frank argued, for appellate opinions were not cases, but post facto rationalizations of decisions at the conclusion of cases. To understand a case, students needed to study "the complete records . . . beginning with the filing of the first papers, through the trial in the trial court and to and through the upper courts" and to observe actual court proceedings. But studying case records and observing trials was not enough. Echoing the views of other practice-grounded commentators, Frank argued that law students needed clinical experiences that would replicate the best features of the apprenticeship model. They needed to work under the supervision of faculty who were expert practitioners on the litigation of actual cases.

52. Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907 (1933).

53. *Id.* at 912.

In Frank's view, students also needed classroom study, but that study needed to be either interdisciplinary or quick and dirty. Consistent with the Realist belief in a "sociological jurisprudence,"⁵⁴ Frank advocated instruction of law students by social scientists who could educate them to "the inter-relation between law and the phenomena of daily living," and by logicians and psychologists who could broaden and deepen their understanding of legal reasoning. And in what sounded oddly like an appeal for the return of rote learning, Frank proposed that legal concepts be more straightforwardly set out in text books and lectures; indeed, like perplexed law students and like the author of the first Carnegie Report, he seemed to favor a return to the treatise and lecture format that characterized the curriculum Langdell had replaced. Frank proposed more straightforward teaching of legal concepts because he thought it would be more efficient, leaving ample time for the learning that, in Frank's view, really mattered: interdisciplinary study and training on the apprenticeship model. In Frank's terms, law students needed a "clinical lawyer-school" run by a healthy mix of scholars and scholarly practitioners, rather than a Langdellian "law-teacher school" run by and for the professional professoriate Langdell (and Eliot) had created.⁵⁵

Llewellyn's and Frank's different assessments of Langdell's method reveal the underlying logic of the case method as well as its lingering mythology. As Llewellyn saw, the case method was perfectly suited to training students to understand how rules evolve as lawyers argue the implications of purported instantiations.⁵⁶ But in the end Langdellian classes came to be widely thought of as detached (pseudo)scientific quests for absolute "truth,"⁵⁷ and giants like Oliver

54. LAW AND SOCIAL ACTION: SELECTED ESSAYS OF ALEXANDER H. PEKELIS 1–41 (Milton Konvitz ed., 1950).

55. Frank, *supra* note 52, at 918–20.

56. Even Frank seemed to recognize the case method's promise. He wrote: "noting . . . [Langdell's] plea for induction, his efforts to avoid the glib generalities of casebooks, one cannot help feeling that he was seeking obliquely and fumblingly to return to some extent to courtroom actualities." *Id.* at 909–10.

57. For more explanatory accounts of this perception, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1985) 54–55 (describing an association between the "virility" of active learning and late nineteenth century notions of the scientific); LAURA

Wendell Holmes accused Langdell of naively treating law as a system of a priori rules.⁵⁸

III. GETTING BACK ON TRACK

A. *Sniffing Out False Dichotomies*

Frank advocated a multifaceted lawyer-school rather than Langdellian case method teaching. The problem lies in the “rather than.” This unfortunate dichotomization badly distorts the function of Langdell’s case method for at least two reasons. First, as we have seen, the case method was not designed to make law students reclusively cerebral. It was designed to enliven their learning by making it experiential rather than simply receptive. It was a move from treating law students as passive recipients of settled knowledge to making them active interpreters of arguably settled rules in the context of new relationships and circumstances. This is the lawyer’s art. S/he is not simply someone who knows things or knows how to look things up; s/he is most importantly someone who can purposefully and responsibly interpret the law in order to advocate, to counsel, to structure relationships, or to exercise judgment. The law student’s hunger for basic knowledge is, of course, not a bad thing. Nor were Frank and the first Carnegie Report wrong to worry that Langdellian method might slow and complicate the acquisition of basic knowledge. Every law student should get to know a set of classic legal texts and basic legal principles, and this body of knowledge is so vast and ever-changing that some shortcuts to learning are required. It is impractical to try to teach everything through Froebelian play. There will always be a tension between resources and efficiency on the one hand and educational richness on the other. But the work of interpretation, advocacy and judgment that goes on in a thoughtfully run Langdellian classroom is central to

KALMAN, LEGAL REALISM AT YALE 13 (1986) (describing associations between the case method and late nineteenth century Darwinism, positivism and passion for science).

58. KIMBALL, *supra* note 11, at 109 (quoting Oliver Wendell Holmes, Book Review, 14 AM. L. REV. 233 (1880) (reviewing C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (1879)).

every aspect of practice, and it makes perfect sense to practice these skills in classroom dialogue and in simulations.

The second problem with the Realist critique of Langdellian education is that the case method does not, as many Realists charged, presume scientific absolutism. Some of Langdell's statements about the nature of law do suggest that he was attempting to lead his students to knowledge that was fixed, unchanging and knowable. In the oft-quoted introduction to his casebook on the law of contracts, he wrote:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.⁵⁹

It makes sense, then, to imagine that after Langdell prompted Mr. Fox to state the case of *Payne v. Cove*, and prompted Mr. Rawle to give the plaintiff's argument, and invited Mr. Adams to agree or disagree, he asked Mr. Rawle a series of challenging questions that led to the conclusion that his argument for the plaintiff was wrong. And it could be that Langdell then led Mr. Adams through a review of precedent to the "a-ha!" moment of seeing the correct result, and hence making a judgment supporting the court if the case was rightly decided and faulting the court if it was not.

But this would be an oversimplification. Having reviewed Langdell's "published works, his letters, and about ten thousand pages of loose or bound manuscripts,"⁶⁰ Kimball found only three references to law as a natural science. Taking Langdell's work as a whole, Kimball concludes that these three references were "anomalous."⁶¹ Kimball also explains that Langdell's undergraduate

59. CHRISTOPHER COLUMBUS LANGDELL, CASES ON CONTRACTS, at vi (1871).

60. KIMBALL, *supra* note 11, at 350.

61. *Id.*

training in the natural sciences took account of the fact that a purely inductive process cannot logically lead to a closed and formal system⁶² and demonstrates that Langdell's scholarship, like that of Holmes, addressed the complex and contradictory interplay of a formalistic deference to authority and an indeterminacy that allows the law to respond to notions of justice and efficiency.⁶³ The evidence now available should cause us to recognize that Langdell was a sophisticated scholar who realized that, science or not, law poses hard questions that can't be, or at least haven't been, resolved with certainty.⁶⁴

This sophistication was also reflected in Langdell's teaching. Kimball's recreations of two of Langdell's classes support the conclusion that Langdell cared more about what and how his students thought than about whether they knew right answers. Langdell pushed his students beyond simple answers, consistently demanding reasons and arguments.⁶⁵ It may be, then, that he challenged Rawle and Adams mercilessly until they were disabused of any naive certainty about the correct result and ready to join their Socrates in a mutual quest for the truth of the matter. And it may even be that Langdell went beyond Socratic examination to mutual inquiry, devoting at least some of his class sessions to what education theorists (borrowing from philosophers of language) would call genuine questions—questions about which the questioner is actually curious. Perhaps when Langdell asked Mr. Adams what he thought of the plaintiff's arguments he meant not to set a trap but actually to discover and discuss what Mr. Adams thought. Certainly, many current Socratic teachers have that motivation.

One can use the case method and be for, against, or agnostic about the mysterious and wonderful questions of when law and lawyering are merely practical and when they become experimental and

62. *Id.* at 24–27.

63. *Id.* at 108–29.

64. *But see* Rubin, *supra* note 7, at 631–35 (arguing that Langdell's thought was insufficiently advanced to have encompassed a notion of uncertainty).

65. KIMBALL, *supra* note 11, at 147–60.

whether they are always in some way experimental.⁶⁶ Even in the so-called hard sciences, work is sometimes practical (as in testing a sample of blood for known viruses); sometimes experimental (as in identifying a new virus) and sometimes both (as in identifying a new virus in the course of treating a patient). Learning by doing makes sense for the biochemist whether he expects to experiment or to apply fixed principles. By the same token, learning by doing makes sense in the law whether we believe that judging and lawyering are always practical, sometimes practical and sometimes experimental, or always experimental.

B. Framing a Desegregation Plan

I did not offer my story of derailment to suggest that legal realism all by itself distorted or destroyed the Langdellian revolution. There are lots of alternative stories. We could imagine the apprenticeship model steadily perfecting itself and then getting derailed when legal education was handed over to universities. Within the university setting, we could imagine a growing clinical movement getting derailed by academics who wanted legal education to seem more scholarly and scientific. We could imagine a movement toward clinical education in public interest settings being derailed by the reality that law schools train both public interest and private sector lawyers and the belief that different skill sets are required to serve the rich than to serve the poor. We could imagine that traditionalists derail or limit clinical education on the theory that public interest practitioners are incapable of objectivity and intellectual rigor but are ideologically biased and excel at story-telling. Or we could turn the tables again to argue that clinical scholars have undermined Langdellian teaching by telling students that those who know do and those who don't know teach. Each of these stories has a grain of truth, but each misinterprets and oversimplifies, and each has a generous sprinkling of unwarranted blame.

66. See Peggy Cooper Davis & Elizabeth Ehrenfest-Steinfeld, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997) (demonstrating that Socratic method can (and should) be used consistently with an appreciation of indeterminacy).

These kinds of oversimplification, misinterpretation and blame are the result of factionalization. Clinical and other experiential teachers and scholars do not communicate extensively or effectively with so-called academic teachers and scholars. Why should this be so? We can find an answer in Claude Steele's brilliant extension of the already profound theory of "stereotype threat." Steele and various co-authors initially used laboratory experiments to show that anxiety about confirming a negative stereotype impedes performance by those who are subject to stereotyped thinking.⁶⁷ Thus, an older person might suffer a memory lapse because—or in part because—s/he knows that older people are generally thought to be forgetful. Or a woman might suffer disabling math anxiety because she knows that women are thought to be less adept than men in mathematics. Newer research by Steele and colleagues shows that anxiety is similarly aroused among those who fear confirming that they *hold* negative stereotypes.⁶⁸ Thus, a younger person may fear conveying the expectation that an older person will be forgetful. Or a man may fear conveying the expectation that women will be less able in mathematics. Steele and his colleagues have shown that both of these forms of anxiety lead to distancing and disengagement.⁶⁹ Put simply, when we have reason to fear a negative judgment, we flee in order to avoid being judged. The result, of course, is mutual ignorance and deepening misunderstanding.

What's needed is some Barackian courage and tolerance. As our President would say, we can not achieve tolerance unless we confront the differences and misunderstandings that have kept us apart. In the spirit of correcting misunderstandings and achieving the tolerance that educational reform will require, I propose a friendly amendment to the Carnegie Report. Instead of calling for integration, let's call for desegregation.

67. See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 613 (1997).

68. Philip Atiba Goff, Claude M. Steele & Paul G. Davies, *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. OF PERSONALITY & SOC. PSYCH. 91, 105 (2008).

69. *Id.*

The advantage of the term “desegregation” is that it reminds us that we need to undo something. We don’t just need to put the three apprenticeships together; we need to undo the effects of their segregation by resolving the misunderstandings that caused us to keep them apart.

It isn’t hard to find common ground for Legal Realists and proponents of progressive education reform. Surely Frank was right, and in harmony with Charles Eliot’s vision of education, when he argued that some of professional training should occur in clinical settings. We are in increasing agreement that Frank was also right about the need to make professional education broadly multidisciplinary. Whether or not we believe that the answers to legal questions are ultimately indeterminate, there is a consensus that their resolution is usefully informed by social scientific knowledge and by knowledge about individual and collective decision-making. A hundred years of work in the fields of psychology and education support the learning theory that underlies Eliot-Langdellian teaching methods. Indeed, the reasoning behind these methods has been embraced by clinical teachers and scholars even as it has gone ignored by most teachers and scholars whom we might classify as Langdellian.

Thinking in these more harmonious terms, law schools are beginning to achieve the kind of meaningful integration that the Carnegie critique requires. We continue to learn at every turn, but I think we’re getting some things right.

First, law professors across the country increasingly understand Langdellian teaching as an experiential enterprise. Langdellian teachers continue to put—and to make a point of putting—students in role. We ask our students to do cognitive work toward hypothetical but practical ends, and we challenge them to do it responsibly. We have also developed new teaching methods that build on experiential learning theory. The problem method casebook is a prominent and increasingly popular example. I recently polled my clinical and academic colleagues to ask how many of them required students to answer questions or do assignments in role, used or had written problem-method casebooks or had developed simulations for their

courses. Only one of the 31 colleagues who responded had done none of these things; all but two reported that they questioned students in role or had them do assignments in role.⁷⁰

As an example, for more than twenty-five years, we at NYU have worked to achieve what the great practitioner-scholar-clinician Anthony Amsterdam envisioned when he created our Lawyering program: to assure that over the three years of legal study every student has the opportunity to learn in increasingly realistic and active professional contexts.

- All of our first year students are enrolled in a year-long simulation course (Lawyering) in which they do increasingly complex exercises in legal interpretation, legal research, fact development, interviewing, counseling, written and oral advocacy and prescriptive drafting. Our central goals are to deepen students' understanding of legal principles by giving them the opportunity to put those principles to use and to teach them to be reflective and self-critical in every dimension of practice. Members of the Lawyering faculty are experienced, reflective and scholarly practitioners who work in each simulation to guide students in defining their professional roles and responsibilities and developing the full range of skills necessary to professional excellence. We stress the relationships between the work students do in Lawyering and the work they do in their Langdellian courses, and we stress the need for intellectual versatility and context-sensitivity in every dimension of practice.
- We have developed a still small but sophisticated set of upper level simulation courses in which students can continue to deepen their understanding of law by using

70. Survey results on file with author.

it and continue to focus sharply on the development of professional skill.

- We are expanding our clinical program to assure that clinical experience is available in a full range of substantive practice areas. Our clinics are not designed to be enclaves for those disaffected from Langdellian teaching. They are designed to cap a carefully conceived series of experiential learning experiences, each of which is related explicitly to professional development.

The desegregation process is not proceeding with very deliberate speed. Langdellian teachers still tell students that they should not take clinical courses. There are still clinical teachers who tell students that Langdellian classes are of little use. Genuine integration is necessarily hard to achieve. But we have made steady progress toward the day when no student leaves law school without having thought about what it means to use the law in the service of a client or a cause. And no student is qualified to seek admission to the bar until she has struggled to carve out a professional role that responsibly balances service to a client or cause and service to the common good.